Subject Index

	Page
Statement of the case	1
Reasons for denying the writ	4
(a) There is no unsettled federal question and no conflict of decision	4
(b) The court of appeals below properly followed and applied the precedents of this court	4
(c) Unpaid contributions by a bankrupt employer to a fringe benefit vacation and holiday trust fund in a multi-employer industry are entitled in bankruptcy proceedings to priority status as "wages . . . due to workmen" under Section 64a(2) of the Bankruptcy Act	5

Table of Authorities Cited

Cases	Pages
Division of Labor Law Enforcement v. Sampsell, 172 F.2d 400	6
Joint Industry Board v. U.S. 391 U.S. 224, 20 L.Ed.2d 46	4, 8, 9
Koven v. Local 5767 United Steelworkers, 381 F.2d 196	6
Lines v. Frederick, 400 U.S. 18, 27 L.Ed.2d 124	5
Strauss-Duporquet v. Local 3 IBEW, 386 F.2d 649	6
Sulmeyer v. Southern California Pipe Trades, 301 F.2d 768	5, 7
U.S. v. Embassy Restaurant, 359 U.S. 29, 3 L.Ed. 601	4, 7, 9
United States v. Munro-Van Helms Co., 243 F.2d 10	6

Statutes

Bankruptcy Act:	
Section 70a	5
Section 64a(2)	5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

ORLANDO J. BOWMAN, Trustee in Bankruptcy of the Estate of E. V. Moore of California, Inc., Bankrupt,
Petitioner,

vs.

BAY AREA PAINTERS' TRUST FUND,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASE

Respondent, Bay Area Painters' Trust Fund, is the fringe benefit trust of the painting industry of Northern California created by collective bargaining agreement between labor and management. (Record pages 47, 48 and 49; Record pages 42 and 43.)

Like carpenters, painters electricians and plumbers, the painters here involved are part of the building and construction trades of Northern California and ordinarily work for several employers in the course of a year. The painters are dispatched to their various employers through a union hiring hall in the various local unions.

The bankrupt, E. V. Moore of California, Inc., was a painting contractor and a party to the Collective Bargaining Agreement.

The Collective Bargaining Agreement in effect at the time here involved, May 9, 1963, through August 9, 1963, required the bankrupt, E. V. Moore of California, Inc. as a painting contractor to pay to the respondent the following sums for each painter for each hour employed:

14½¢ per hour to Welfare Trust;
20¢ per hour to Vacation Trust;
10¢ per hour to Pension Trust;
10¢ per hour to Holiday Trust.
(Record page 6.)

The formal holiday trust document expressly provided that Federal Income Tax was to be withheld on holiday payments and that holiday payments were to be considered as part of the employee's wages. (Record page 45.) The holiday trust compelled respondent to pay out all accumulated holiday benefit on December 1st of each year upon application by the employee involved. (Record page 46.)

By Article 3 of the vacation trust, each employee subject to the trust shall take one continuous week-

long vacation during each vacation year. The time for vacation shall be scheduled by agreement between each employee and his then current employer, if any. Under Article 3 Section 3(b) the respondent shall, upon application, on April 1st of each year, pay to the employee involved his accumulated vacation money. Article 3 Section 2(a) requires employers to first withhold income tax from the sums paid as vacation pay and stipulates that payments to the respondent for vacation purposes are part of the employee's wages.

It is stipulated in this case that the Federal Withholding Income Tax was withheld by the bankrupt at the time the holiday and vacation contributions should have been made to respondent.

The painter employees who are beneficiaries of the respondent have thus paid Federal Income Tax on holiday and vacation benefits which they have yet to receive.

It is stipulated that the bankrupt's contributions which should have been made to the respondent for vacation and holiday trust purposes for the three months prior to the filing of bankruptcy, namely from May 9, 1963, to August 9, 1963, totaled $5,601.72. (Record page 85.)

The respondent, Bay Area Painters' Trust Fund, acting on behalf of itself and on behalf of each of the bankrupt's painter employees as set forth in the Record, pages 55 through 73, claims that the agreed amount $5,601.72 is entitled to priority status under Section 64a(2) of the Bankruptcy Act.

Holiday and vacation contributions are collected by respondent in this multi-employer painting industry for administrative convenience.

The contributions are paid out annually to the employee upon application.

REASONS FOR DENYING THE WRIT

(a) THERE IS NO UNSETTLED FEDERAL QUESTION AND NO CONFLICT OF DECISION

The lower federal Courts in this case have construed and applied two prior cases of this Court, *Joint Industry Board v. U.S.*, 391 U.S. 224, 20 L.Ed.2d 46, and *U.S. v. Embassy Restaurant*, 359 U.S. 29, 3 L.Ed. 601, to a slightly different fact situation. This is the normal judicial process. There is no conflict of decisions of the Courts of Appeals. The decision of the Court of Appeals below ascertained the underlying rationale of the prior cases and applied it to the new fact situation. Unless this Court is to review every single decision of the Courts of Appeals interpreting the meaning of "wages", there is no reason to grant the writ here.

(b) THE COURT OF APPEALS BELOW PROPERLY FOLLOWED AND APPLIED THE PRECEDENTS OF THIS COURT

Petitioner claims on page 8 of his petition that the Court of Appeals disregarded the tests laid down by this Court.

The Court of Appeals below adopted the reasoning and opinion of the District Court (see Petition Appendix, page xvi).

The District Court expressly considered and applied the applicable precedents (see Petition Appendix, page viii).

We believe (as apparently petitioner does also) that the case *Lines v. Frederick* 400 U.S. 18, 27 L.Ed.2d 124, does not apply to the instant case. The *Lines* case involved the question of whether vacation pay owed to a bankrupt employee was includable in the Bankruptcy estate under Section 70a of the Bankruptcy Act. This case involves the very different question of whether vacation pay owed by a bankrupt employer is entitled to priority of payment as "wages" from the bankruptcy estate under Section 64a(2). Different statutes and different policies are involved.

(c) UNPAID CONTRIBUTIONS BY A BANKRUPT EMPLOYER TO A FRINGE BENEFIT VACATION AND HOLIDAY TRUST FUND IN A MULTI-EMPLOYER INDUSTRY ARE ENTITLED IN BANKRUPTCY PROCEEDINGS TO PRIORITY STATUS AS "WAGES . . . DUE TO WORKMEN" UNDER SECTION 64a(2) OF THE BANKRUPTCY ACT.

It is unpaid vacation and holiday benefits only that are involved in this case. Health and Welfare benefits are not involved and pension benefits are not involved. Respondent concedes that under the current decisions of this Court, health and welfare benefits and pension benefits are not "wages" entitled to priority. This Court has not yet passed on the priority of vacation and holiday pay, although the Ninth Circuit has in the case *Sulmeyer v. Southern California Pipe Trades,* 301 F.2d 768. The *Sulmeyer* case held that vacation and holiday benefits were entitled to priority.

If an employee worked for a single employer under terms that provided two weeks paid vacation per year and the employer went bankrupt at the end of the two week vacation period, no one would doubt that the vacation pay earned within 90 days prior to bankruptcy is "wages" entitled to priority. See *Division of Labor Law Enforcement v. Sampsell,* 172 F.2d 400.

It was stated in *United States v. Munro-Van Helms Co.,* 243 F.2d 10, page 13:

> "Vacation pay is by all of the decisions regarded as wages."

See for example:

Koven v. Local 5767 United Steelworkers, 381 F.2d 196, 205;

Strauss-Duporquet v. Local 3 IBEW, 386 F.2d 649, 650.

In the case before the Court the holiday and vacation pay is accumulated in a trust only because the painter employee works for many different employers during the year in the building and construction industry. The collection trust is set up by the collective bargaining agreement because in the building trades no one employer can be obligated to provide an employee a vacation with pay.

The painter employees who are beneficiaries of the respondent have already paid their Federal Income Tax on the vacation and holiday pay here claimed. The painter employees have a vested right to the vacation and holiday pay and the respondent must pay the accumulated money to the painter employee upon application at designated times each year. The

payment is made annually only for administrative convenience and economy.

In 1959 in *U.S. v. Embassy Restaurant,* 359 U.S. 29, 3 L.Ed. 601, this Court held that contributions by an employer to a union health and welfare plan providing life insurance, sick benefits, hospital and surgical benefits were not "wages" entitled to priority. The Court relied on the following factors:

1. The flat monthly sum contributed of $8.00 per month had no relation to hours worked, wages or productivity.

2. The sum was paid to trustees, not the working man, and it was enforceable only by trustees.

3. The employee had no enforceable legal interest in the contributions.

4. The parties considered them contributions and not wages.

5. The trustees had the exclusive management of the funds.

In the Ninth Circuit 1962 case, *Sulmeyer v. Southern California Pipe Trades,* 301 F.2d 768, the Court held that contributions to a multi-employer fringe benefit trust fund for vacation and holiday purposes were "wages" entitled to priority and distinguished the *Embassy* case because of the following factors:

1. Income Tax had been withheld on the vacation and holiday contributions.

2. The contributions represented a percentage of wages paid and thus had a relation to hours worked and productivity.

3. The employee had vested rights as to his accumulated vacation and holiday pay.

4. The holiday and vacation pay was definite and certain and not contingent.

In the latest Supreme Court case, *Joint Industry Board v. U.S.*, 391 U.S. 224, 20 L.Ed.2d 46, 48, employer's contributions to a pension plan were held not to be wages entitled to priority because of the following factors:

1. The employee had only a contingent nonvested right to the pension.

2. Contributions were payable to a trustee, not the employee.

3. The employee was not taxed on the contribution. (See footnote 3.)

4. The benefits to the employees were deferred and provided no relief from the distress of temporary unemployment.

The crux of the opinion is the following, stated at 391 U.S. page 229:

> "If there is still any question as to whether claims for unpaid contributions to provide deferred benefits to employees should share the assets of bankrupts with general creditors or should be entitled to the limited priority granted wages due to workmen, any new resolution of that question should come from Congress."

The distinction from the cases is clear. Those fringe benefits which are *deferred and contingent* are not "wages" entitled to priority within the meaning of the

Bankruptcy Act. An employee may never get sick so that he may never draw health and welfare benefits. An employee may choose not to retire or may die prior to retirement and thus draw no pension benefits.

On the other hand, unpaid vacation and holiday benefits accrued within 90 days prior to bankruptcy are "wages" entitled to priority. Payment in the instant case of holiday and vacation benefits is made annually only for administrative convenience in a multi-employer industry. The employee has a definite vested right in the sums and can get both holiday and vacation pay annually merely upon filing an application. Neither holiday nor vacation pay is contingent.

In the instant case the rates of 10¢ per hour for holiday benefits and 20¢ per hour for vacation benefits are not flat contributions as in *U.S. v. Embassy Restaurant,* but have a direct relation to the hours worked and wages earned. 30¢ per hour was about 7% of the total hourly wage of $4.22.

Here the employee has an enforceable vested legal interest in the holiday and vacation accumulations.

Here the parties by express contract considered the contribution wages.

Here by express contract and by command of law, Federal Income Tax has already been paid or withheld on the sums involved.

In the case, *Joint Industry Board v. U.S.* (supra) this Court laid great stress that the purpose of the bankruptcy wages priority was to provide relief from the distress of temporary unemployment.

Those employees who work for many employers in the building and construction industry are just as distressed by the loss of their vacation and holiday benefits as is an employee who works for a single bankrupt employer. There is no reason to discriminate between the two employees in the multi-employer situation here involved. Here the employee gets his vacation and holiday benefits annually for reasons of administrative convenience. The painter knows he will get these benefits. They are vested. The painter can safely borrow money to finance his holiday and his vacation, secure in the knowledge that these benefits will come to him upon his application at the proper time. The knowledge by a painter employee that vacation and holiday benefits are definitely available can alleviate the hardship occasioned by the bankruptcy of the employer in today's credit economy almost as directly and certainly as wages paid directly to the employee.

The respondent respectfully urges that the reasoning of the Courts below is sound. Where a painter employee has paid income tax on his vacation and holiday pay, it would be harsh indeed to hold that what he paid tax on was other than wages.

Dated, Walnut Creek, California,
October 7, 1971.

Respectfully submitted,
DOUGLAS R. PAGE,
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Bay Area Painters' Trust Fund.